TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. 135

SIMEON HALLOWELL, APPELLANT,

vs.

JOHN M. COMMONS, AS ACTING INDIAN AGENT AND SUPERINTENDENT AND SPECIAL DISBURSING AGENT FOR THE OMAHA TRIBE OF INDIANS OF NEBRASKA, AND SARAH H. WALKER.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED APRIL 26, 1916.

(24,185)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 459.

SIMEON HALLOWELL, APPELLANT,

vs.

JOHN M. COMMONS, AS ACTING INDIAN AGENT AND SUPERINTENDENT AND SPECIAL DISBURSING AGENT FOR THE OMAHA TRIBE OF INDIANS OF NEBRASKA, AND SARAH H. WALKER.

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a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1913, of said Court, Before the Honorable William C. Hook and the Honorable Walter I. Smith, Circuit Judges, and the Honorable Charles F. Amidon, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit: on the seventeenth day of February, A. D. 1913, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Nebraska, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein Simeon Hallowell is Appellant and John M. Commons, as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, et al., are Appellees, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 No. 178, Y.

Pleas Before the Honorable William H. Munger, Judge of the District Court of the United States for the District of Nebraska, Sitting in said Court, within the Eighth Judicial Circuit, at the April, 1912, Term Thereof.

(*Bill of Complaint.*)

Be It Remembered, That on the 19th day of April, 1909, there was filed in the office of the Clerk of the Circuit Court, Bill in Equity, which said Bill is in words and figures following, to-wit:

In the Circuit Court of the United States in and for the District of Nebraska for the Omaha Division. In Equity.

SIMEON HALLOWELL
vs.
JOHN M. COMMONS, as the Indian Agent and the Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of the State of Nebraska, and Sarah Hallowell Walker.

To the Honorable the Judges of said Court:

Simeon Hallowell a member of the Omaha Tribe of Indians, residing at Macy in Thurston County, in the State of Nebraska, brings

this his bill of complaint against John M. Commons, as the acting Indian Agent and as Superintendent and Special Disbursing Agent, duly appointed and acting under authority of the Interior Department and specially authorized under Acts of Congress and the Rules and Regulations of the Interior Department, to supervise and recommend for approval by the Commisioner of Indian Affairs and the Secretary of the Interior leases, and to receive and disburse the rents to proper beneficiaries, of Indian lands and allotments on the Omaha Indian Reservation in Thurston County and State of Nebraska, and Sarah Hallowell Walker, residents of Macy in said County and State.

Whereupon your orator says that the matter in dispute as hereinafter set forth exceeds the value of Two Thousand ($2,000) Dollars, exclusive of all interest and costs, and that the rights and equities in and to said matter in dispute depends upon the interpretation and construction of an express trust declared in and contained in
2 the 8th section of the Act of Congress of August 7, 1882, published in Volume 22 of the United States Statutes at Large, page 341.

Your orator further says that some time during the year 1883 one Jacob Hallowell, a member of the Omaha Tribe of Indians, was by virtue of said Act of Congress, allotted eighty acres of land on said Omaha Indian Reservation as follows, to wit: The west half of the Southeast quarter (¼) of Section Seven (7), in Township Twenty-four (24), Range Nine (9), in Thurston County, Nebraska, of the value of Thirty two Hundred ($3200.) Dollars.

Your orator further says that on the 29th day of December, 1884, by virtue of the 6th section of said Act of Congress, the United States of America, executed and delivered its memoranda trust patent for said lands for the special use and benefit of said Jacob Hallowell, or his heirs according to the force and effect, of the express trust, conditions, restrictions and limitations contained in said Act of Congress and also as contained in said trust patent as follows:

"That the United States does and will hold the land thus allotted for the period of 25 years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever, and if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, that the law of descent and partition in force in the said State shall apply thereto after patents therefor have been executed and delivered."

Your orator further says that under the terms of the said express trust, conditions, restrictions and limitations made concerning said lands in said law of Congress, the United States of America has and does now retain the fee simple estate of inheritance in and to said land, but charged with an express trust for the period of 25 years as

yet unexpired, without power of alienation, for the sole use and benefit of said Jacob Hallowell, but that in the event that said Jacob Hallowell should die during the period of said trust of 25 years, then the said residue and remainder of said unexpired trust of 25 years,
to inure for the benefit of the legal heirs of the said Jacob
3 Hallowell, in the character of purchasers and grantees of the
United States by virtue of said express trust, and not by law of descent from said Jacob Hallowell, deceased, the said trust of 25 years not being an inheritable f-eehold estate with descendable qualities, but an executory trust and that the limitations contained in said act of Congress in favor of the said heirs of Jacob Hallowell take effect in enjoyment by operation of the law governing executory devises, interests and trust created in wills and deeds.

Your orator further says that during said trust of 25 years, about the year 1885, said Jacob Hallowell died without leaving children or issue of deceased children or lineal descendants, or father or mother, but left a widow surviving him who died about the year 1886, and that said Jacob Hallowell left surviving him as his nearest kin and heirs at law one Megretae Clay of Macy, Nebraska, his half sister, and your orator as his only nephew, your orator being the only son of one Benjamine Hallowell a deceased half brother of the said Jacob Hallowell, deceased.

Your orator further says that from the time of the death of the said Jacob Hallowell up to the time of the death of said Megretae Clay, which occurred in December, 1906, the said Megretae Clay and your orator took equal shares of the use and benefit and the rents of said land as equal beneficiaries of said residue and unexpired trust of 25 years.

Your orator further says that since the death of said Megretae Clay, there is no other person whatever who stands as the nearest kin and heir of said Jacob Hallowell, deceased, except your orator who is the sole and only nephew and heir of the body of said Jacob Hallowell, deceased, and that according to the force and effect of the executory character of said residue and unexpired trust of 25 years, as aforesaid, your orator is the sole and only beneficiary of the residue of said trust of 25 years, and is entitled to lease and receipt for all rents of said land, under the acts of Congress and the rules and regulations of the Interior Department provided for the leasing of Indian lands and allotments as aforesaid.

Your orator further says that Hiram Chase of Pender, Nebraska, is a grand nephew of said Jacob Hallowell deceased, the said Hiram Chase being the only son of Mrs. Hiram Chase who died in 1875, the niece of said Jacob Hallowell, said Mrs. Hiram Chase being a deceased daughter of the said Megretae Clay, deceased, half sister of the said Jacob Hallowell, deceased, and that said Hiram Chase
being only a grand nephew of the said Jacob Hallowell, and
4 not the nearest kin and heir at law of said Jacob Hallowell,
deceased, equal with your orator as the nearest kin nephew and heir of said Jacob Hallowell, deceased, and that according to the force and effect of the executory trust of 25 years, aforesaid, the said Hiram Chase has only an expectant right in said trust, to take effect

in enjoyment and possession in the event that your orator should die before the expiration of said trust of 25 years.

Your orator further says that one Eileen Lawless, now of Oklahoma state, is a great grand niece of the said Jacob Hallowell, deceased, the said Eileen being the sole daughter of Mrs. Pauline Lawless a deceased grand niece of the said Jacob Hallowell, deceased, the said Pauline Lawless being the sole deceased daughter of Mrs. Hiram Chase, Sr., a deceased niece of said Jacob Hallowell, deceased, the said Mrs. Hiram Chase, deceased, being the sole deceased daughter of said Megretae Clay, deceased, the half sister of the said Jacob Hallowell, and that by force and effect of the executory trust of 25 years, as aforesaid, the right of said Eileen to said land is only expectant, and does not take effect in enjoyment and possession unless your orator as nephew, and all the grand nephews, and all the grand nieces of the said Jacob Hallowell, deceased, become extinct during the existence of said trust of 25 years.

Your orator further says that notwithstanding that under the above mentioned act of Congress the United States has and does now retain the fee simple estate of inheritance in and to said land herein described, charged with only an executory trust of 25 years, as above explained, and that your orator stands in the relation of the nearest kin and heir of the said Jacob Hallowell and is the sole beneficiary of said residue and remainder of the unexpired trust of 25 years aforesaid; the defendant, John M. Commons, as Indian Agent, and as Superintendent and Special Disbursing Agent, as aforesaid, unlawfully pretends and advises the defendant Sarah Hallowell Walker, that said Jacob Hallowell died seized of a freehold estate of inheritance, and not a trust of 25 years as contended and as above explained by your orator, and that defendant unlawfully pretends and advises defendant Sarah Hallowell Walker that upon the death of the said Jacob Hallowell, deceased, an undivided one half of said land descended by law of inheritable estates to said Megretae Clay as near kin and heir and half sister of the said Jacob Hallowell, deceased, and that the other undivided one half of said land descended, as aforesaid, to your orator and defendant Sarah Hallowell Walker, by right of representation as nephew and niece of the said
5 Jacob Hallowell, deceased, your orator being the only son of one Benjamin Hallowell a deceased brother of the said Jacob Hallowell, deceased, and the defendants pretending that said Sarah Hallowell Walker is also the only daughter of the said Benjamine Hallowell deceased brother of the said Jacob Hallowell, deceased.

Your orator further says that the pretended claims of the defendants with respect to the pretended rights of said Hiram Chase and Eileen Lawless are unfounded in law or equity governing executory trusts as above explained, and as to the pretended claims of defendants on behalf of said defendant Sarah Hallowell Walker, your orator says that said Sarah Hallowell Walker is an unlawful and illegitimate daughter of the said Benjamine Hallowell, deceased, and is incapable of being heir to the said Jacob Hallowell, deceased, equal with your orator, so as to be among the beneficiaries of said trust of 25 years; that about fifty years ago said Benjamine Hallo-

well, the deceased half brother of Jacob Hallowell, deceased, married one Sindawe Elk an Omaha Indian woman. That said Sindawe died about forty years ago and that your orator is the sole surviving issue of said marriage. That afterwards about the year 1874 said Benjamine Hallowell then married one Mary Tyndall an Omaha Indian woman; that the issue of said last mentioned marriage were Willie Hallowell and Clyde Hallowell, who died in childhood; that during the time that said Benjamine Hallowell was married to and living with his said wife Mary Hallowell and his said children, as one family, the said Benjamine Hallowell in accordance with a barbarous usage and custom of Indian tribes, during the year 1875, took unto himself one Gradustawe Blackbird, an Omaha Indian woman, as his concubine, second, plural and polygamous consort, in contravention of the laws and court- of civilized nations and states, including the state of Nebraska, and the United States of America, and that said Benjamine continued to keep said Gradustawe as his concubine, second, plural and polygamous consort in his said family up to the time of his death, which occurred about 24 years ago, and that said Sarah Hallowell Walker was born on November 15, 1876, and is the illegitimate issue of the said unlawful and illicit union between the said Benjamine Hallowell and the said Gradustawe, and that said Sarah Hallowell Walker while related by blood to said Jacob Hallowell, deceased, *and* is not an heir at law of the said Jacob Hallowell, deceased, and not a beneficiary of said trust of 25 years.

Your orator further says that defendant- also pretend that said Sarah Hallowell Walker is an heir equal of said Jacob Hallo-
6 well, deceased, with your orator as aforesaid, for that defendants pretend that under the usages and customs of the Omaha tribe of Indians, that children born of unlawful polygamous Indian Marriage take the same legal status of children born in lawful wedlock, and inherit real estate from decedents upon the same footing as other legal heirs. Your orator avers the facts to be that no such usage or custom as pretended by defendants ever existed among said Omaha tribe of [Indian-], and that the institution of the laws of descent and succession of real estate of decedents was never known to the laws and customs of the said Omaha tribe of Indians and that your orator avers the fact to be that with respect to the trust of 25 years, aforesaid, the beneficiaries of said trust upon the death of the said Jacob Hallowell is expressly provided by said Act of Congress that the legal heirs according to the laws of Nebraska of the said Jacob Hallowell be the beneficiaries of said trust, and not according to the barbarous laws and customs of other nations, states or tribes if any such laws exist. And your orator being the only person now standing in the position of the nearest kin and only nephew and heir at law according to the laws of Nebraska of the said Jacob Hallowell, by force and effect of the executory trust declared of said land by said act of Congress your orator is the sole and only present beneficiary of the residue of said unexpired trust in said land, and is entitled to lease and receipt for all the rents of the same under the laws of Congress and the rules and regulations of the Interior Depart-

ment provided for the leasing of Indian lands and allotments on the Omaha Indian Reservation aforesaid.

Your orator further says that said Hiram Chase makes no claim to the premises above described except as stated in foregoing paragraphs of this complaint, for which reason your orator does not include said Hiram Chase as party defendant; and that as to Eileen Lawless, your orator does not include her as party defendant herein for that said Eileen Lawless is beyond the jurisdiction and processes of this court.

Your orator further says that under the pretended claims of the defendants, the defendant John M. Commons by virtue of his office as Indian Agent and Superintendent and Special Disbursing Agent, as aforesaid, refuses to accord the right of your orator to lease said land and take and receipt for all rents of the same, as sole beneficiary of said trust, as provided by the acts of Congress and the rules and regulations of the Interior Department as aforesaid, and that defendants combining against your orator unlawfully insist that your orator shall not make lease and receive rents of said land as aforesaid, unless your orator consents that defendant Sarah Hallowell Walker, and Hiram Chase, and Eileen Lawless join in the
7 making of said lease and participate in the distribution of the rents of said premises, and that said defendants without the consent of your orator have proceeded to lease said land, by which said defendant, John Commons, has or will come into the possession of the rentals of said land for the year 1909 of the value of $250.00 and that your orator has no adequate legal remedy to enforce and quiet his rights in the premises except by injunction issuing out of this court restraining and enjoining defendants from asserting their pretended claims aforesaid, and be also enjoinedfrom preventing your orator from leasing said premises in his own right and taking all rents of the same hereafter.

Wherefore, your orator prays:

(1). That said defendants may be compelled to answer all and singular, the premises in this bill but not under oath, answer under oath being hereby expressly waived.

(2.) That it be decreed that under the terms of the 6th section of the act of Congress of August 7, 1882, published in 22 Vol. of the United States Statutes at Large, 341, that the fee simple estate of inheritance in and to the real estate herein described, is retained by the United States of America, but charged with an express trust of 25 years without power of alienation, for certain beneficiaries.

(3.) That it be decreed that the beneficiaries of said trust of 25 years, are Jacob Hallowell, but that in the event of his death during said trust of 25 years, then the residue and unexpired trust of 25 years, inures and vests in the legal heirs according to the law of Nebraska, of the said Jacob Hallowell, deceased, in the character of purchasers and grantees of the United States by force and effect of the executory character of said trust of 25 years and governed by the rules of law governing, executory devises, uses and trusts created in wills and deeds, and not by law applicable to inheritable freehold estates of inheritances.

(4.) That it be decreed that Simeon Hallowell the complainant being the nearest kin, and only nephew and heir at law of the said Jacob Hallowell, deceased, is the sole and only beneficiary of said residue and unexpired trust of 25 years, and entitled to lease the same and receive all the rents and profits of the same without hindrance from any person whomsoever, under the acts of Congress and the rules and regulations of the Interior Department providing for the leasing of Indian lands and allotments.

(5.) That it be decreed that Hiram Chase of Pender, Nebraska, has only an expectant right in and to said trust of 25 years,
8 to take effect and enjoyment and possession, in the event that said Simeon Hallowell should die during the existence of said trust of 25 years.

(6.) That it be decreed that Eileen Lawless of Oklahoma, has only an expectant right in and to said trust of 25 years, to take effect and enjoyment and possession in the event of the extinction of the nephews and grand nephews and grand nieces of the said Jacob Hallowell, deceased.

(7.) That it be decreed that Sarah Hallowell Walker is not a legal heir of the said Jacob Hallowell, and is not entitled to be a beneficiary of said trust of 25 years.

(8.) That a preliminary injunction be awarded herein and made permanent at the final hearing, restraining and enjoining the defendant John M. Commons, as Indian Agent and as the Superintendent and Special Disbursing Agent, and defendant Sarah Hallowell Walker from preventing the Complainant Simeon Hallowell from making lease of said premises alone, and not to prevent him from receipting for all rents of said premises as provided by the laws of Congress, and the rules and regulations of the Interior Department, and that your orator have generally such other and further relief as the circumstances of the case may require.

(9.) That said defendants be declared trustees of all rents now in their hands, in the sum of $250.00, and that they be held to account for the same, and that judgment be awarded your orator for such sum as may be found in [defendants] hands with interest.

(10.) Therefore, that your honors will grant unto your orator not only a writ of injunction conformable to the prayer of this bill, but also the writ of Subpœna issuing out of and under the seal of this Court, to be directed, to said John M. Commons, as the acting Indian Agent and Superintendent and Special Disbursing agent for the Omaha Tribe of Indians of Nebraska, and said Sarah Hallowell Walker, commanding them by a certain day to appear before your honors, in the court aforesaid, and then and there answer the premises, and abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

HIRAM CHASE,
Solicitor for Complainant and of Counsel for Simeon Hallowell, Complainant.

Endorsed: Filed Apr. 19, 1909. Geo. H. Thummel, Clerk.

9 (*Demurrer to Bill of Complaint.*)

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, demur to the said bill and for cause of demurrer show,

1st. That it appears by the plaintiff's own showing by the said bill that he is not entitled to the relief prayed by the bill against these defendants.

2nd. That said bill of complaint is without equity.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, these defendants demur thereto and pray the judgment of this honorable court whether they or any of them shall be compelled to make answer to the said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

CHARLES A. GOSS,
United States Attorney;
A. W. LANE,
Assistant United States Attorney,
Attorneys for Defendants.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

A. W. LANE,
Of Counsel for Defendants.

STATE OF NEBRASKA,
County of Thurston, ss:

John M. Commons, being first duly sworn according to law, deposes and says that he is one of the defendants named in the bill of complaint in this suit and that the foregoing demurrer is not interposed for delay.

JOHN M. COMMONS.

Subscribed in my presence and sworn to before me this 10th day of July, 1909.

[SEAL.] H. MATHEWSON,
Notary Public.

Endorsed: Filed July 14, 1909. Geo. H. Thummel, Clerk.

Memorandum Opinion.

W. H. MUNGER, *D. J.:*

These cases are in effect actions to quiet title to certain real estate and to recover from the respondent, Commons, Agent of
10 the Omaha Tribe of Indians, a certain sum of money received as rentals for said real estate. From the bill it ap-

pears that Congress alloted to one Benjamine Hallowell, a member of the Omaha Tribe of Indians, a certain tract of land under the provisions of the act of Congress of August, 1882. Complainant is a son of Benjamine Hallowell. The bill further alleges facts showing, I think, that, while Benjamine Hallowell was married to one Mary Tindall, and while she was his lawful wife, he, in accordance with the usage and custom of the Omaha Indian Tribes, entered into a plural and polygamous marriage with a woman of the Omaha Indian Tribe, named Gradustawe Blackbird, and that the respondent, Sarah Hallowell Walker, is the child of said plural and polygamous marriage; that said Benjamine Hallowell is deceased and that said Sarah Hallowell Walker and Gradustawe Blackbird claim an interest in said real estate as heirs of said Benjamine Hallowell.

To the bill respondents have filed a general demurrer.

It is claimed on the part of complainant that Benjamine Hallowell did not, by virtue of the trust patent, under the act of August, 1882, acquire an inheritable title to said land; that it descended to his heirs by right of purchase and not by descent.

To this I do not assent. I think it clear that, by the trust patent, Benjamine Hallowell acquired such an estate in the land in controversy as descended to his heirs, according to the laws of Nebraska. As to whether Sarah Hallowell Walker and Gradustawe Blackbird are heir and widow of Benjamine Hallowell, and as such entitled to share in his estate, I think depends upon whether the polygamous marriage referred to was entered into prior to the allotment of the land to Benjamine Hallowell. Upon the allotting of the land to Benjamine Hallowell he became a citizen of the United States and the issue of a polygamous marriage after that time would not, I think, have the status of a legal heir. If, however, the marriage between Benjamine Hallowell and Gradustawe Blackbird was [consum-ated] prior to his receiving his allotment, and becoming a citizen of the United States, I think she would be entitled to the rights of a widow and that Sarah Hallowell Walker would inherit as an heir, under the authority of Ortley vs. Ross, 78 Neb., 339.

The bill specifically denies that Sarah Hallowell Walker is an heir and that Gradustawe Blackbird is his widow. As it does not appear from the bill, as stated, that the marriage was [consum-ated] prior to the allotment, I do not think the demurrer
11 well taken and for this reason it is overruled.

If the parties desire to obtain the ruling of the appellate court on this question, it could be done with less expense by amending the bill, specifically stating the fact in this respect, if it be such a fact, that such polygamous marriage was [consum-ated] according to the customs and usages of the tribe prior to the [allotment]. Unless complainant sees fit to do this, however, it will have to be presented by an answer.

Endorsed: Fied Jul. 21, 1910. Geo. H. Thummel, Clerk.

(*Order, Nov. 9, 1910, Sustaining Demurrer and Dismissing Bill.*)

Before Judge William H. Munger.

This cause coming on to be heard on the Demurrer of the defendants in the above cause to the bill of the plaintiff, the same is submitted to the Court. After due consideration thereof, and being fully advised in the premises, the Court finds that said Demurrer is well taken in law, and the same is hereby sustained, and plaintiff electing to stand on its bill, it is hereby

Ordered, that said bill be and the same hereby is dismissed at the costs of the plaintiff; to which ruling of the Court the plaintiff duly excepts, which exception is hereby allowed.

(*Stipulation to Set Aside Order Dismissing Bill, etc., and for Amendment of Bill.*)

It is stipulated by and between the parties hereto that the judgment heretofore entered in the above cause be set aside by order of the Court, and that the bill be re-instated and that the complainant amend the same in thirty days by adding an allegation that the marriage betwen Benjamine Hallowell and Gradastawe Blackbird was consummated in accordance with Indian custom then prevailing prior to the passage of the Act of August 7, 1882, and that the defendant Sarah Hallowell was born prior to said Act, and that said cause be set down for argument on the demurrer of the defendant to said bill as amended.

HIRAM CHASE,
Attorney for Plaintiff.
A. W. LANE,
Ass't United States Attorney.

Endorsed: Filed Oct. 3, 1911. Geo. H. Thummel, Clerk.

12 (*Order Vacating Order of Dismissal and Reinstating Bill, etc.*)

As stipulated by the parties in the above entitled cause,

It Is Ordered, that the judgment heretofore entered, be and the same is hereby set aside and vacated, and the bill is reinstated, the complainant to amend in thirty (30) days in accordance with stipulation this day filed, and the cause set down for argument on the demurrer of the defendants to the said amended complaint.

WM. H. MUNGER.

Endorsed: Filed Oct. 20, 1911. Geo. H. Thummel, Clerk.

Memorandum Opinion.

WM. H. MUNGER, *D. J.*:

Pursuant to a stipulation of the parties filed October 3rd, 1911, the judgment therefore entered in the above cause was vacated and complainant given leave to amend his bill of complaint by adding an allegation that the marriage between Benjamine Hallowell and Gradustawe Blackbird was consummated in accordance with the Indian custom then prevailing prior to the passage of the act of August 7th, 1882, and that the defendant Sarah Hallowell was born prior to said act, and the cause was set down for argument on the demurrer of the defendant to the bill as so amended.

Complainant amended his bill in that respect by interlineation, and subsequently, on November 14th, 1911, without leave of court, filed a new and amended bill, changing somewhat the allegations of the original bill. Defendants have moved to strike this bill from the files, for the reason that it is not in conformity with the stipulation.

It is apparent that complainant has paid no regard to the stipulation, and for that reason the motion to strike the amended bill, subsequently filed, is sustained.

The case being further considered upon the demurrer of defendants to the bill, said demurrer is sustained and the bill dismissed.

Endorsed: Filed Jun. 25, 1912. R. C. Hoyt, Clerk.

(*Order, June 25, 1912, Sustaining Motion to Strike Amended Bill, etc., and Dismissing Original Bill.*)

Upon due consideration of the Motion of Defendant to strike the Amended Bill in the above entitled cause, it is Ordered,
13 by the Court, that said Motion to strike the Amended Bill be, and the same is hereby, sustained.

And Further Ordered That the Demurrer of the defendants to the original Bill be, and the same is hereby sustained, and the Bill dismissed, to which ruling of the Court the plaintiff excepts.

Assignment of Errors.

Comes now the above named complainant, Simeon Hallowell, and files the following assignment of errors:

First. That the Court erred in entering its order and decree sustaining the demurrer of the defendants to the complainant's bill of complaint;

Second. That the Court erred in ruling that complainant's bill of complaint did not state a cause of action and in entering its order and decree dismissing the complainant's bill of complaint;

Third. That the Court should have found that, by virtue of the

Sixth Section of the Act of Congress of August 7, 1882, (22 U. S. S. at L. 341, etc.) the fee title, or the freehold estate of inheritance in and to the real estate described in the above cause was and now is in the United States of America, but charged merely with a trust for the term of twenty-five years therein, without power of alienation in favor of Jacob Hallowell, with a contingent remainder in favor of his lawful kindred and heirs, according to the laws of Nebraska, of the said Jacob Hallowell, by way of an execution trust, by purchase and not by descent, in the event of the death of the said Jacob Hallowell during said trust of twenty five years. That upon the death of the said Jacob Hallowell, deceased, on the 4th day of March, 1885, the right to the use and possession and of the rents and profits of said real estate vested as aforesaid in Simeon Hallowell, the complainant, and Megretae Clay on the grounds that said Simeon Hallowell was and now is the nearest kin, nephew and heir according to the laws of Nebraska, of the said Jacob Hallowell, deceased, and that said Megretae Clay was the half-sister, near kin and heir-at-law of the said Jacob Hallowell, deceased. That on the death of Megretae Clay, on December —, by reason of the executory character of said trust, all of said use and benefit and the rents and profits of said real estate then vested in said complainant, Simeon Hallowell alone, as the only surviving nearest kin, nephew and heir at law of the said Jacob Hallowell, deceased. That Hiram Chase, being the grand nephew of said Jacob Hallowell,
14 deceased, was not and is not an heir of the said Jacob Hallowell, deceased, and not entitled to any present interest in said real estate.

That Eileen Lawless, being the great-grand-niece of the said Jacob Hallowell, deceased, was not, and is not an heir of the said Jacob Hallowell, deceased, and was not and is not entitled to any present interest in and to said real estate. *That Eileen Lawless being the great-grand-niece of said Jacob Hallowell, deceased, was not, and is not an heir of the said Jacob Hallowell, deceased, and was not and is not entitled to any present interest in and to said real estate.*

That said Sarah H. Walker is not an heir of said Jacob Hallowell and is not entitled to any right in and to said real estate, for that said Sarah H. Walker was and now is the illegitimate daughter of Benjamin Hallowell, deceased, for that said Sarah H. Walker was born out of the polygamous relations between the said Benjamin Hallowell, deceased, and one Gradustawe Blackbird, and that said Benjamin Hallowell, deceased, was the brother of the half-blood of the said Jacob Hallowell, deceased, and that said Jacob Hallowell has no widow, issue or children of deceased issue, or lineal descendents, father or mother, or brothers or sisters surviving him.

Wherefore, the complainant prays that said orders and decrees of the Court be reversed and that the said Court be instructed to enter such decree as will give the complainant the relief prayed for in his bill.

HIRAM CHASE,
Solicitor for the Complainant.

Endorsed: Filed Dec. 19, 1912. R. C. Hoyt, Clerk.

(*Petition for and Order Allowing Appeal.*)

To the Honorable W. H. Munger, Judge of the District Court for the District of Nebraska, Omaha Division:

The above named complainant, feeling himself aggrieved by the order and decree made and entered in this cause on the 25th day of June, 1912, sustaining the demurrer of the above named defendants, does hereby appeal from said order and decree to the Circuit Court of Appeals of the United States, for the Eighth Circuit, for the reasons specified in the assignment of errors, which is herewith filed, and he prays that his appeal be allowed and that citation issue, as provided by law, and that a transcript of the records, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit, sitting at the City of St. Louis, in the state
15 of Missouri, U. S. A.

HIRAM CHASE,
Solicitor for Complainant.

The foregoing petition this day presented in open court is granted and the appeal allowed.

Dated at Omaha, Nebraska, this 19th day of December, 1912.

WM. H. MUNGER, *Judge.*

Endorsed: Filed Dec. 19, 1912. R. C. Hoyt, Clerk.

(*Bond on Appeal.*)

Know All Men By These Presents:

That we, Simeon Hallowell, as principal and Cynthia Chase as surety, are held and firmly bound unto John M. Commons as acting Indian and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska and Sarah H. Walker, in the full and just sum of Five Hundred Dollars to be paid to the said John M. Commons, as acting Indian Agent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska and Sarah H. Walker, their heirs, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this Seventeenth day of December, in the year of our Lord one thousand nine hundred and twelve.

Whereas, lately at the April term A. D. 1912, of the District Court of the United States for the District of Nebraska, in a suit depending in said Court between said Simeon Hallowell, plaintiff and John M. Commons, as acting Indian Agent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska and Sarah H. Walker, defendants a decree final was rendered against the said Simeon Hallowell, and the said Simeon Hallowell, has obtained an allowance of an appeal of the said Court to reverse the said final decree in the

aforesaid suit, and a citation directed to the said John M. Commons as acting Indian Agent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, and Sarah H. Walker, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said Citation.

Now the Condition of the above Obligation is such, That if the said Simeon Hallowell shall prosecute said appeal to effect,
16 and answer all damages and costs if he fail to make good his plea, then the above obligation to be void, else to remain in full force and virtue.

[SEAL.] SIMEON HALLOWELL.
By his solicitor, HIRAM CHASE,
[SEAL.] CYNTHIA CHASE.

Sealed and Delivered in Presence of

FRED SAMMONS.
FRED SAMMONS.

Approved by

WM. H. MUNGER, *Judge.*

Endorsed: Filed Dec. 19, 1912. R. C. Hoyt, Clerk.

STATE OF NEBRASKA,
Thurston County, ss:

Cynthia Chase being first duly sworn deposes and says that she is a resident of said county that she has property in said county in the State of Nebraska subject to execution over and above all exemptions of the value of $1000.

CYNTHIA CHASE.

Subscribed in my presence and sworn to before me this 18th day of December, 1912.

[SEAL.] HIRAM CHASE,
Notary Public.

(Citation.)

The United States of America to John M. Commons, as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, and Sarah Walker, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an appeal, filed in the Clerk's office of the District Court of the United States for the district of Nebraska, wherein Simeon Hallowell is appellant and you are

appellees, to show cause, if any there be, why the judgment rendered against the said appellant, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

17 Witness, the Honorable Wm. H. Munger, Judge of the District Court of the United States for the District of Nebraska, this nineteenth day of December in the year of our Lord one thousand nine hundred and twelve.

WM. H. MUNGER,
United States District Judge
for the District of Nebraska.

Service of this citation accepted this 19th day of December, 1912.

A. W. LANE,
Asst. U. S. Atty.

Filed in the District Court on Dec. 19, 1912.

(*Præcipe for Transcript.*)

To the Clerk of said Court:

Please prepare transcript of the record in the above entitled action for the Circuit Court of Appeals consisting of the following:

Bill in Equity filed April 19, 1909.
Demurrer filed July 14, 1909.
Memo. Opinion filed July 21, 1910.
Order sustaining demurrer, entered Nov. 9, 1910.
Stipulation filed Oct. 3, 1911.
Order (judgment vacated) entered Oct. 20, 1911.
Memo. Opinion filed June 25, 1912.
Decree entered June 25, 1912.
Assignment of Errors.
Petition for allowance of Appeal.
Order allowing Appeal.
Bond.
Citation.

HIRAM CHASE,
Solicitor for Complainant.

Endorsed: Filed Dec. 6, 1912. R. C. Hoyt, Clerk.

18 (*Clerk's Certificate to Transcript.*)

UNITED STATES OF AMERICA,
District of Nebraska, ss:

I, R. C. Hoyt, Clerk of the District Court of the United States, for the District of Nebraska, do hereby certify that pursuant to the order of Court and in compliance with the Præcipe, a copy of which is found on Page 36 hereof, the foregoing record has been made; and

that the same is a true and faithful transcript of the pleadings and proceedings of record and on file in said Court as mentioned in said Præcipe, and as indicated in the foregoing index, in the case of Simeon Hallowell, Complainant, vs. John M. Commons, as the Indian Agent and the Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of the State of Nebraska and Sarah Hallowell Walker, Defendants, Case No. 178, Docket "Y", and that a copy of the Citation duly certified has been lodged and remains in my said office as such Clerk.

Witness my hand and the seal of the said District Court at Omaha, in said District this 10th day of January, A. D. 1913.

[Seal U. S. District Court, District of Nebraska, Omaha Division.]

R. C. HOYT, *Clerk.*

Filed Feb. 17, 1913. John D. Jordan, Clerk.

19 *(Appearance of Counsel for Appellant.)*

United States Circuit Court of Appeals, Eighth Circuit.

No. 2923.

SIMEON HALLOWELL, Appellant,
vs.
JOHN M. COMMONS, as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, and Sarah Walker.

The Clerk will enter my appearance as Counsel for the Appellant.

HIRAM CHASE,
Pender, Nebr.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Feb. 17, 1913.

(Appearance of Mr. F. S. Howell as Counsel for the Appellee.)

The Clerk will enter my appearance as Counsel for the Appellees.

F. S. HOWELL,
U. S. Atty. for the District of Nebraska.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 11, 1913.

(*Appearance of Mr. A. W. Lane as Counsel for the Appellees.*)

The Clerk will enter my appearance as Counsel for the Appellees.

A. W. LANE,
Asst. U. S. Atty., Lincoln, Nebr.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Apr. 12, 1913.

20 (*Order of Submission.*)

May Term, 1913.

TUESDAY, May 20, 1913.

This cause having been called for hearing in its regular order, argument was commenced by Mr. Hiram Chase for appellant and concluded by Mr. A. W. Lane for appellees.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

21 (*Opinion.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1913.

No. 3923.

SIMEON HALLOWELL, Appellant,
vs.
JOHN M. COMMONS, Acting Indian Agent, etc., et al., Appellees.

Appeal from the District Court of the United States for the District of Nebraska.

Mr. Hiram Chase, for appellant.

Mr. A. W. Lane, Assistant United States Attorney (Mr. F. S. Howell, United States Attorney, on the brief), for appellees.

Before Hook and Smith, Circuit Judges, and Amidon, District Judge.

SMITH, *Circuit Judge*, delivered the opinion of the Court:

Simeon Hallowell brought suit in equity against John M. Commons as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, and Sarah Hallowell Walker. The defendants demurred to the bill on the grounds that the complainant was not entitled to the relief

prayed for and that the bill of complaint was without equity. The demurrer was sustained and the complainant electing to stand on his bill it was by the court dismissed and Mr. Hallowell appeals.

It appears from the bill that Jacob Hallowell was a member of the Omaha tribe of Indians and was allotted eighty acres of land under Section 5, 22 Statutes 341. On December 29, 1884,
22 the United States issued to him the preliminary patent as provided in Section 6 of the same act, which is as follows:

"SEC. 6. That upon the approval of the allotments provided for in the preceding section by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State of Nebraska, and that at the expiration of said period the United States will convey the same by patent to said Indian or his heirs as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That, the law of descent and partition in force in the said state shall apply thereto after patents therefor have been executed and delivered."

In 1885, Jacob Hallowell died. He left a widow who died in 1886. There were left surviving him a number of persons who claim or may claim to be Jacob Hallowell's "heirs according to the laws of the state of Nebraska." At the time of the death of Jacob Hallowell he left a then living half sister, Megretae Clay, who died in December, 1906, and the heirs of a deceased half brother, Benjamin Hallowell. When Megretae Clay died she left, first, a grand son Hiram Chase 2nd, now of Pender, Nebraska, who was the son of Hiram Chase 1st and his wife, the latter was the daughter of Megretae Clay, and second, a great grand daughter, Eileen Lawless, who was the daughter of Pauline Lawless who was the daughter of Mrs. Hiram Chase 1st, who was the daughter of the said Megretae Clay. Said Benjamin Hallowell, about fifty years ago, was married and the appellant Simeon Hallowell is the sole fruit of such marriage. Thereafter and prior to 1874, Benjamin Hallowell married an Omaha Indian, Mary Tyndall. There are no children surviving as the result of this marriage. In 1875, and while his wife, formerly Mary Tyndall was still living and still
23 his wife, Benjamin Hallowell took a second plural and polygamous wife, Gradustawe Blackbird, an Omaha Indian woman, and she bore him one daughter on November 15, 1876, named Sarah Hallowell, now Sarah Hallowell Walker. It thus appears that this Sarah Hallowell Walker is the half sister of the appellant. The appellant in his bill states that none of these parties, Sarah Hallowell Walker nor Hiram Chase 2nd, nor Eileen Law-

less are entitled to participation in the rents of the said eighty acres. In his bill he prays:

1. That it be decreed that under the terms of the 6th Section of the Act of Congress of August 7, 1882, 22 Stats. 341, that the fee simple estate of inheritance in and to the real estate herein described is retained by the United States of America but charged with an express trust of twenty-five years without power of alienation for said beneficiaries.

2. That it be decreed that the beneficiaries of said trust of twenty-five years are Jacob Hallowell but in the event of his death during said trust of twenty-five years then the residue and unexpired trust of twenty-five years inures and vests in the legal heirs according to the laws of Nebraska, of the said Jacob Hallowell, deceased, in the character of purchasers and grantees of the United States by force and effect of the executory character of said trust of twenty-five years, and governed by the rules of law governing executory devises, uses and trusts created in wills and deeds and not by law applicable to inheritable freehold estates of inheritances.

3. That it be decreed that Simeon Hallowell, the complainant, being the nearest kin and only nephew and heir at law of the said Jacob Hallowell, deceased, is the sole and only beneficiary of said residue and unexpired trust of twenty-five years and entitled to lease the same and receive all the rents and profits of the same without hinderance from any person whomsoever under the Acts of Congress and the rules and regulations of the Interior Department providing for the leasing of Indian lands and allotments.

4. That it be decreed that Hiram Chase of Pender, Nebraska, has only an expectant right in and to said trust of twenty-five years to take effect and enjoyment and possession in the event that said Simeon Hallowell should die during the existence of said trust of twenty-five years.

24 5. That it be decreed that Eileen Lawless, of Oklahoma, has only an expectant right in and to said trust of twenty-five years to take effect and enjoyment and possession in the event of the extinction of the nephews and grand nephews and grand nieces of the said Jacob Hallowell.

6. That it be decreed that Sarah Hallowell Walker is not a legal heir of the said Jacob Hallowell and is not entitled to be a beneficiary of said trust of twenty-five years.

7. That an injunction issue as against John M. Commons as Indian Agent, Superintendent and Special Disbursing Agent, and Sarah Hallowell Walker from preventing the complainant Simeon Hallowell from making a lease of said premises alone and not to prevent him from receipting for all rent of said premises as provided by the laws of Congress and the rules and regulations of the Interior Department, and for general equitable relief.

The bill does not make Hiram Chase 2nd a party because it is alleged he makes no claim adverse to the complainant, and the said Hiram Chase brings this suit as solicitor for the complainant, and Eileen Lawless was not made a party because she was beyond the

jurisdiction and processes of the court. It is stated in the brief for appellant that Eileen Lawless is now deceased.

Notwithstanding the rule in Shelley's case it is first contended that the words "his heirs according to the laws of the state of Nebraska" as used in Section 6, 22 Stats. 341, and as also used in the preliminary patent are words of purchase and not of limitation of the estate. Appellant cites Hall v. Russell, 101 U. S. 503; McCune v. Essig, 199 U. S. 382, and Cutting v. Cutting, 6 Fed. 259.

By operation of the law and the preliminary patent the equitable interest in this land subject to the restrictions contained in the statute and possibly to the plenary power of Congress to enact legislation for the government of the Indians passed and the Government retained the legal title for twenty-five years.

The District Court found against the appellant on this question and we are inclined to think it was correct as the law and the preliminary patent vested in the grantee the equitable title but reserved the legal title in the Government, the case is unlike the cases cited, but in view of other questions in this case it is unnecessary to decide that question.

The first question to decide is whether the court below had any jurisdiction of this case.

On June 25, 1910, Congress passed a law: "That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive." 36 Statutes 855.

It is contended this law was clearly in conflict with the provisions of the Constitution: First. "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." Article III, Section 1. Second. "The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority." Article III, Section 2.

While it is true that the judicial power of the United States extends to all cases in equity arising under the laws of the United States it does not follow that the jurisdiction of any given court extends thereto. The Congress had power to confer such jurisdiction upon any court created by it. The original jurisdiction of the Supreme Court is defined by the Constitution by Clause 2 of Section 2 of Article III and it is not pretended that such cases as this come within its provisions. It was entirely optional with Congress under Section 1 of Article III whether it would create any inferior courts at all. It has undoubted power to create such courts to exercise a portion only of the judicial power. For example, it has created the Court of Customs Appeals and the Commerce Court and has had in contemplation the creation of a Court of Patent Appeals. Clearly these Courts would not have jurisdiction of such cases as this.

In other words, a thing may be within the judicial power of the United States but not within the jurisdiction of any particular court created by Congress. It therefore becomes important to tell
26 what was the original jurisdiction of the courts, state and national, over such cases as this before the legislation directly bearing on this case was enacted. The Supreme Court of the United States has said: "As observed in the Smith case, 194, U. S. 408, prior to the passage of the act of 1894, 'the sole authority for settling disputes concerning allotments resided in the Secretary of the Interior.' This being settled, it follows that prior to the act of Congress of 1894 controversies necessarily involving a determination of the title and incidentally of the right to the possession of Indian allotments while the same were held in trust by the United States were not primarily cognizable by any court, either state or Federal." 204 U. S. 458, 468.

In that situation Congress passed the law: "That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto, in the proper Circuit Court of the United States." 28 Stats. 286, 305.

Under this statute or the amendatory act of February 6, 1901, 31 Stats. 760, the complainant might have claimed "to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any act of Congress," but for the enactment of 36 Stats. 855 which took the jurisdiction away from the court which had existed since August 15, 1894, and vested it exclusively in the Secretary of the Interior. This act of June 25, 1910, was, therefore, as applied to its subject matter of lands the legal title to which was in the Government, valid and repealed so much of the acts of 1894 and 1901 as conflicted therewith. Parr v. Colfax, 117 C. C. A. 48, 197 Fed. 302; Pel-Ata-Yakot v. United States, 188 Fed. 387; Bond v. United States, 181 Fed. 613.

It is contended that "it is now definitely settled by a long list of cases that courts of justice will interpose and protect the equities and rights of persons to lands under the statutes where such rights
27 are infringed because of erroneous procedure of the officers of the Land Department either upon the facts or upon the law."

Aside from the fact that the act of June 25, 1910, provided that the decisions of the Secretary of the Interior shall be final and conclusive, which we think Congress had the power to do, as to lands the legal title to which the Government held, it is not alleged in the bill that the Secretary of the Interior has as yet passed upon the question as to who are the heirs of Jacob Hallowell according

to the laws of the state of Nebraska and the rule asserted would not give the courts any right to interfere until the matter had been passed upon by the Secretary of the Interior. This necessitates the affirmance of this case but we may add that the Government has never recognized any distinction as to the right of inheritance among the Indians between the children of the first wife and the children of a polygamous consort where the Indians by their customs while in a tribal state permitted polygamy.

The United States Supreme Court has never directly passed upon this question. It was directly presented to that court in Jones v. Meehan, 175 U. S. 1. In that case it appears, page 26: "On July 23 and 24, 1895, the defendant introduced testimony of Moose Dung the younger, and of other Indians, showing that his father had two wives, both living at the same time, and left six surviving descendants; three children, (1) Moose Dung the younger, the eldest son by the first wife, (2) a daughter by the first wife, and (3) a daughter by the second wife; and three grandchildren, (4) a son of a deceased daughter by the first wife, (5) a daughter of a deceased daughter by the first wife, and (6) a son of a deceased son by the second wife." The question was thus directly presented as to whether the children and grandchildren by the second wife were entitled to inherit. If the Supreme Court had thought the mere fact of their descent from the second wife defeated their claims it could easily have said so. It apparently recognized their claims as heirs but decided the case upon other grounds.

The Supreme Court of Michigan first had the question before it in Compo v. Jackson Iron Company, 50 Mich. 48, 16 N. W. 295. Judge Cooley in his opinion did not announce the rule contended for by appellant. The court then consisted of Graves, Chief Justice, and of Cooley, Campbell and Sherwood, Justices. Judge
28 Cooley delivered the opinion of the court, Sherwood, Justice, concurred, and Graves, Chief Justice, concurred in the result but not in the opinion, while Campbell, Justice, dissented.

In substantially the same case Kobogum v. Jackson Iron Co., 76 Mich. 498, 43 N. W. 602, the court unanimously sustained the right of inheritance of a child of a polygamous consort, holding that she could inherit from her father.

In Ortley v. Ross, et al., 78 Neb. 339, 110 N. W. 982, the opinion says: "Now, it is contended by appellants that, as the alleged marriage between the father and mother of the plaintiff was polygamous, it was neither valid in the state of Minnesota, where the parties then resided, nor in the state of Nebraska, to which they subsequently removed. This contention would be well founded if this marriage had taken place between citizens of the United States in any state of the Union. But a different rule prevails with reference to the marriages of Indians, who are members of a tribe recognized and treated with as such by the United States Government; for it has always been the policy of the general government to permit the Indian tribes as such to regulate their own domestic affairs, and to control the intercourse between the sexes by their own customs and usages. Consequently, when a member of an Indian

tribe becomes a citizen of the United States and subject to its laws, by taking lands in severalty under the provisions of a treaty, as in the case at bar, a liberal rule is applied in determining the legitimacy of any offspring that he may have begotten under the customs and usages of the tribe to which he formerly belonged. The rule so applied is that marriages valid by the law governing both parties when made must be treated as valid everywhere."

If this is not an announcement that the children of a polygamous marriage, made while the parties were members of an Indian tribe and in accordance with the customs and usages of the tribe, are lawful heirs of the father we do not understand it.

While decisions are cited that monogamous marriages according to the Indian custom are valid we do not understand that any of them involved the question of the validity of a polygamous marriage according to Indian custom.

29 We are therefore of the opinion that Sarah Hallowell Walker was the lawful heir of Benjamin Hallowell under the laws of Nebraska and entitled equally with appellant to share in any inheritance from Jacob Hallowell, deceased.

The right of Sarah Hallowell Walker to be considered an heir according to the laws of Nebraska is in no wise dependent upon her parents having been married according to the laws of Nebraska. This Indian tribe at the date of the marriage of the mother of Sarah Hallowell Walker and Benjamin Hallowell was a semi-independent power and though dwelling within the state of Nebraska it could make no laws affecting the customs among these Indians and least of all could any laws on marriage of Nebraska have any effect among the members of such Indian tribe. They owed no allegiance to the state while in their tribal relation and received from the state no protection. United States v. Kagama, 118 U. S. 375.

Manifestly Nebraska laws had nothing to do with whether plural marriages should take place among them or not. Congress could have passed a law prohibiting plural marriages among tribal Indians if it saw fit but it *do* not do so. They were left to be governed by their own tribal laws as to all social relations that might exist among them. The Indians were subject, while their tribal relations existed, to the laws only of Congress and in the absence of such laws were left to be governed by their own laws and customs as to domestic and social practices including marriage and whether they should practice monogamy or polygamy was left wholly to them. Under the laws of Nebraska we are inclined to think that Hiram Chase 2nd and Eileen Lawless did not inherit any present interest in the equity in the land in question alloted to Jacob Hallowell. Douglass v. Cameron, 66 N. W. 430.

But that was a question for the Secretary of the Interior to determine. It follows this case must be Affirmed.

Filed January 29, 1914.

30 (*Decree.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1913, Thursday, January 29, 1914.

No. 3923.

SIMEON HALLOWELL, Appellant,
vs.
JOHN COMMONS, as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, and Sarah Walker.

Appeal from the District Court of the United States for the District of Nebraska.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Nebraska, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that John M. Commons, as acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska and Sarah Walker have and recover against Simeon Hallowell the sum of twenty dollars for their costs herein and have execution therefor.

January 29, 1914.

(*Petition for Appeal to Supreme Court U. S.*)

To the Honorable Walter I. Smith, Judge of the United States Circuit Court of Appeals for the Eighth Circuit:

The above named Simeon Hallowell, feeling himself aggrieved by the order and decree made and entered in this cause on the 29th day of January, 1914, sustaining the demurrer of the above named defendants, does hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is herewith filed, and prays that his appeal be allowed and that citation issue, as provided by
31 law, and that a transcript of the records, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Supreme Court of the United States, sitting at the City of Washington, in the District of Columbia, U. S. A.

HIRAM CHASE,
Solicitor for Petitioner.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 26, 1914.

(*Assignment of Errors on Appeal to Supreme Court U. S.*)

To the Honorable Judges of Said Court:

Comes now the above named Simeon Hallowell, the appellant, and files the following assignment of errors:

First. That the Court erred in entering its order and decree sustaining the demurrer of appellees to the complainant's bill of complaint.

Second. That the Court erred in ruling that complainant's bill of complaint did not state a cause of action, and in entering its order dismissing the complainant's bill of complaint.

Third. That the Court should have found that by virtue of the 6th Section of the Act of Congress of August 7, 1882, the fee title, or the freehold estate of inheritance in and to the real estate described in this cause, was, and now is, in the United States, but charged with a trust for a term of twenty-five years (and until a fee-simple patent for said land is issued to proper grantees) without power of alienation, and in favor of Jacob Hallowell, with a further grant of said trust by way of an executory trust, or contingent remainder, in favor of his lawful kindred and heirs, according to the laws of Nebraska, and not according to the laws and customs of the Omaha tribe of Indians.

Fourth. That the Court should have found that upon the death of said Benjamin Hallowell on July 4, 1885, that by reason of the executory character of said trust, the right to the use and possession, and the rents and profits of said real estate vested in Simeon Hallowell, the complainant, his son, as the nearest kin and heir
32 according to the laws of Nebraska as provided by the 6th Section of said Act of 1882.

Fifth. That the Court should have found that said Simeon Hallowell took said trust by force and effect of the grants thereof, contained in said Act of Congress, as purchaser, or donee of the government, and not by descent from said Benjamin Hallowell, deceased, for that said Benjamin Hallowell died merely as a beneficiary of said trust of twenty-five years, and was not seized of the fee title, or the free-hold estate of inheritance in and to said land.

Sixth. The Court erred in allowing Sarah Walker to participate in said trust for that said Sarah Walker was, and now is, the issue of a polygamous marriage between her mother, Gradustawe, and Benjamin Hallowell, deceased, and is therefore not a lawful heir according to the laws of Nebraska of said Benjamin Hallowell, deceased, as expressly provided in said Act of 1882.

Seventh. The Court erred in holding that Sarah H. Walker is a legitimate child of Benjamin Hallowell, deceased, and therefore entitled to participate in said trust.

Eighth. The Court should have found that Sarah H. Walker, being an illegitimate child of Benjamin Hallowell, deceased, is not an "heir" of said Benjamin Hallowell, deceased, within the provisions of the 6th section of said Act of 1882.

Ninth. The Court erred in holding that Gradustawe Blackbird

is the lawful widow of Benjamin Hallowell, deceased, and therefore entitled to participate in said trust.

Tenth. The Court should have found that Gradustawe Blackbird, being the polygamous consort of Benjamin Hallowell, deceased, is not the lawful widow of said deceased, and therefore not entitled to participate in said trust under the terms of said Act of 1882.

Eleventh. The Court erred in not holding that Simeon Hallowell is the sole beneficiary of said trust, and all rights thereto, free from the claims of defendants, for that Simeon Hallowell is the only person who answers to the description of "heir according to the laws of Nebraska" of the said Benjamin Hallowell, deceased, as provided by the 66th Section of the Act of 1882.

Wherefore, the complainant prays that said decree and
33 orders of the Court be reversed, and that said Court be instructed to enter such decree as will give the complainant the relief prayed for in his bill.

HIRAM CHASE,
Solicitor for Complainant.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 26, 1914.

(Bond on Appeal to Supreme Court U. S.)

Know All Men by These Presents:

That we, Simeon Hallowell, as principal, and Cynthia Chase, as surety, are held and firmly bound unto John M. Commons, as Acting Indian Agent for the Omaha tribe of Indians and Sarah H. Walker in the full and just sum of Five Hundred Dollars ($500) to be paid to the said John M. Commons as acting Indian Agent, as aforesaid, and Sarah H. Walker, their heirs, executors, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 24th day of March in the year of our Lord one thousand nine hundred and fourteen.

Whereas, lately at the —— term A. D. 1913, of the Circuit Court of Appeals of the United States for the Eighth Circuit *District* in a suit pending in said Court between Simeon Hallowell, plaintiff and John M. Commons as Acting Indian Agent, etc. for the Omaha tribe of Indians and Sarah H. Walker, defendants a decree was rendered against the said Simeon Hallowell, and the said Simeon Hallowell has obtained an appeal of the said Court to reverse the decree in the aforesaid suit, and a Citation directed to the said John M. Commons as acting Indian Agent, as aforesaid, and Sarah H. Walker citing and admonishing them to be and appear in the Supreme Court of the United States, at the City of Washington, thirty days from and after the date of said Citation.

Now the condition of the above obligation is such, That if the said Simeon Hallowell shall prosecute said appeal to effect, and answer all damages and costs if he fail to make good his plea, then the

34 above obligation to be void, else to remain in full force and virtue.

SIMEON HALLOWELL, [SEAL.]
By His Att'y, HIRAM CHASE.
CYNTHIA CHASE. [SEAL.]
Sealed and Delivered in Presence of
—— ——.

March 24, 1914,
Approved by
WALTER I. SMITH,
Circuit Judge.

STATE OF IOWA,
Pottawattamie County, ss:

I, Cynthia Chase, being first duly sworn, depose and says that I am a resident of Thurston County, Nebraska, and own real and personal property therein subject to execution over and above all exemption of the value of $1000.00.

CYNTHIA CHASE.

Subscribed in my presence and sworn to before me this 24th day of March, 1914.

WALTER I. SMITH.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 26, 1914.

(Order Allowing Appeal to Supreme Court U. S.)

This cause came on to be heard upon appellant's petition and assignment of errors for an allowance of an appeal to the Supreme Court of the United States, in consideration whereof,

It is now ordered that the appeal be and is hereby allowed as prayed, and the bond for said appeal be, and the same is fixed in the sum of $500.00.

March 24, 1914.

WALTER I. SMITH,
Circuit Judge.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Mar. 26, 1914.

35 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Nebraska, as prepared and printed

under the rules of the United States Circuit Court of Appeals for the Eighth Circuit under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Simeon Hallowell is Appellant and John M. Commons, as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, et al., are Appellees, No. 3923, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation issued in this case has not been returned served and therefore is not attached hereto.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-third day of April, A. D. 1914.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

36 THE UNITED STATES OF AMERICA:

To John M. Commons, as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, and Sarah Walker, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, D. C. thirty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Eighth Circuit, wherein Simeon Hallowell is Appellant and you are Appellee-, to show cause, if any there be, why the decree rendered against the said Simeon Hallowell as in said appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter I. Smith, United States Circuit Judge for the Eighth Circuit, this 24th day of March A. D. 1914.

WALTER I. SMITH,
U. S. Circuit Judge for the Eighth Circuit.

Service of above citation accepted on behalf of the defendants John M. Commons and Sarah Walker.
May 4-1914.

F. S. HOWELL,
United States Attorney,
Attorney for Defendants.

[Endorsed:] 1034/24185. Original. 3923. Supreme Court of the United States. October Term, 1913. No. —. Simeon Hallowell, Appellant, vs. John M. Commons, as Acting Indian Agent, etc., et al. Citation on appeal to Supreme Court, U. S.

Endorsed on cover: File No. 24,185. U. S. Circuit Court Appeals, 8th Circuit. Term No. 459. Simeon Hallowell, appellant, vs. John M. Commons, as Acting Indian Agent and Superintendent and Special Disbursing Agent for the Omaha Tribe of Indians of Nebraska, and Sarah H. Walker. Filed April 25th, 1914. File No. 24,185.